MOTION FILED

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No. 04-831

IN THE

Supreme Court of the United States

ILLINOIS CENTRAL RAILROAD COMPANY and MISSISSIPPI DEPARTMENT OF TRANSPORTATION,

Petitioners,

v.

KELLI SMALLWOOD,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MOTION AND BRIEF OF *AMICI CURIAE* BRYAN D. COLLINS, *ET AL.*, AND JOHN W. STEWART, *ET AL.*, IN SUPPORT OF RESPONDENT

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March 14, 2005

MOTION OF BRYAN D. COLLINS, *ET AL.*, AND JOHN W. STEWART, *ET AL.*, FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

This motion for leave to file a brief *amicus curiae* is filed on behalf of the respondents in *American Home Products, et al. v. Bryan D. Collins, et al., and John W. Stewart, et al.*, No. 04-674, which is on petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit. Counsel for respondent in this case – *Smallwood* – have declined to consent to the filing of a brief *amicus curiae*, thereby necessitating the filing of this motion.

Amici have a direct interest in this case because it presents the same issue as *Collins*. In *Collins*, the parents of children who suffered severe health problems after being injected with vaccines containing the preservative thimerosal filed suit in Mississippi state court against diverse and in-state defendants, and the defendants removed the case. The district court found that the Mississippi defendants had been fraudulently joined because the plaintiffs had not exhausted their administrative remedies, as required by the National Childhood Vaccine Injury Act, 42 U.S.C. § 300aa-1 *et seq.* ("Vaccine Act"). Having held that removal was proper, the court then dismissed the entire case on the ground that plaintiffs had not exhausted their Vaccine Act remedies as to the claims against any defendant. On appeal to the Fifth Circuit, the case was consolidated with *Stewart v. American Home Products Corp.*, which arose from the same set of facts. *See Collins v. Am. Home Prods. Corp.*, 343 F.3d 765, 768 (5th Cir. 2003).

The Fifth Circuit's brief opinion quoted *Smallwood* for the proposition that "[w]here there are colorable claims or

defenses asserted against or by diverse and non-diverse defendants alike, the court may not find that the non-diverse parties were fraudulently joined based on its view of the merits of those claims or defenses. Instead, that is a merits determination which must be made by the state court." *Collins*, 343 F.3d at 768-69 (quoting *Smallwood v. Ill. Cent. R.R. Co.*, 342 F.3d 400, 405 (5th Cir. 2003) (quoting *Boyer v. Snap-on Tools Corp.*, 913 F.2d 108, 113 (3d Cir. 1990))). Accordingly, the Fifth Circuit vacated the dismissal of plaintiffs' claims and remanded with instructions to the district court to remand *Collins* and *Stewart* to state court.

Because the analysis in *Smallwood* formed the basis for the Fifth Circuit's decision in the case in which *amici* are respondents, *amici* have a strong interest in the disposition of the petition in this case. They ask therefore that they be granted leave to file the accompanying brief *amicus curiae* supporting denial of the petition for a writ of certiorari.

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QUESTION PRESENTED

Whether a defendant can remove a case containing diverse and non-diverse defendants based on a theory of fraudulent joinder when the argument proffered to prove fraudulent joinder, if correct, would be dispositive of the case against both the diverse and the non-diverse defendants.

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INTEREST OF *AMICI*[1]

As set out in detail in the accompanying motion for leave to file this brief, *amici* have a strong interest in this case because it presents the same question as *American Home Products, et al. v. Bryan D. Collins, et al., and John W. Stewart, et al.*, No. 04-674, in which *amici* are respondents.

STATEMENT OF THE CASE

Kelli Smallwood was injured when a train operated by Illinois Central Railroad Company hit her car at a railroad crossing in Mississippi. She filed suit in Mississippi state court against Illinois Central and against the Mississippi Department of Transportation (MDOT), which controlled the crossing where the accident occurred. Although MDOT was an in-state defendant, Illinois Central removed the case to federal court on the basis of diversity jurisdiction. The district court denied Ms. Smallwood's motion to remand, finding that MDOT was fraudulently joined because the claims against it are preempted by the Federal Railroad Safety Act (FRSA). The court subsequently dismissed MDOT and granted summary judgment to Illinois Central on the same ground upon which it had denied the motion to remand—that Ms. Smallwood's claims are preempted by FRSA. Pet. App. 2a-3a.

The Fifth Circuit reversed, refusing to find fraudulent joinder based on a defense that was equally dispositive of the claims against the diverse and non-diverse defendants. It indicated that finding fraudulent joinder under such

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[1]Pursuant to this Court's Rule 37.6, *amici* state that this brief was not authored in whole or in part by counsel for a party and that no one other than *amici* or their counsel made a monetary contribution to the preparation or submission of this brief.

circumstances would be "contrary to the Supreme Court's century-old command in [*Chesapeake & Ohio Railway Co. v. Cockrell*, 232 U.S. 146, 153 (1914)] that the fraudulent joinder allegations be directed toward the joinder, not to 'the merits of the action as an entirety.'" Pet. App. 49a.

On en banc review, the Fifth Circuit affirmed the panel's decision. The court held that "when a nonresident defendant's showing that there is no reasonable basis for predicting that state law would allow recovery against an in-state defendant equally disposes of all defendants, there is no improper joinder of the in-state defendant." *Id.* at 2a. The court noted that the purpose of the fraudulent joinder theory is to determine whether in-state defendants have been properly joined. Here, although the diverse defendant made its preemption argument first with respect to the non-diverse defendant only, the argument did not go to the propriety of the joinder, but to the merits of the entire case. *Id.* at 7a. The court concluded by noting that the decision to extend federal jurisdiction to cases in which there was not complete diversity was a political decision that could only be made by Congress. *Id.* at 10a-11a.

REASONS FOR DENYING THE WRIT

A. There Is No Meaningful Circuit Split On The Question Presented.

1. Petitioners' primary argument for review is that there is a circuit split on the question presented. However, as amici explained in their opposition to the petition in *Collins*, no circuit court that has analyzed the issue has disagreed with the Fifth Circuit that fraudulent joinder cannot be based on a defense or claim that disposes of the case against both the

diverse and non-diverse parties. To the contrary, the only other federal circuit to have discussed the issue—the Third—reached the same conclusion as did the court below. *See Boyer v. Snap-On Tools*, 913 F.2d 108 (3d Cir. 1990).

Petitioners attempt to manufacture a conflict by pointing to *Ritchey v. Upjohn Drug Co.*, 139 F.3d 1313 (9th Cir. 1998). There, however, the plaintiff did not argue that the common defense theory applied, and the court did not analyze the issue.[2] The Ninth Circuit's discussion of fraudulent joinder focused on whether the plaintiff stated a cause of action against the in-state defendants, given that the statute of limitations against them had already run. The court concluded that the plaintiffs did not state a cause of action and, thus, that the in-state defendants had been fraudulently joined. In the final paragraph of this discussion, the court noted, consistently with the tenor of *Boyer* and the decision below, that it was "slightly peculiar" to call the in-state defendants sham defendants when the statute of limitations had also run against the diverse defendant. *Id.* at 1320. Then, in a single sentence and without citation to any authority, the court stated that, nonetheless, the failure to state a claim demonstrated that the in-state defendants were sham defendants. *Id.* Petitioners' assertion that there is a split among the circuits depends entirely on this passing observation by the Ninth Circuit.[3]

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[2]The plaintiff's appellate briefs in *Ritchey* are available on Westlaw at 1996 WL 33417453 and 1997 WL 33493575.

[3]Petitioners also contend that the Seventh Circuit "implicitly declined to adopt *Boyer*," citing *LeBlang Motors, Ltd. v. Subaru of America., Inc.*, 148 F.3d 680 (7th Cir. 1998). Pet. 11.

(continued...)

2. Petitioners also suggest a conflict in the circuits regarding the meaning of *Cockrell*. Yet Petitioners do not cite a single case that considered and disagreed with the *Boyer* and *Smallwood* courts' interpretation of *Cockrell*. Although Petitioners suggest that, in *Ritchey*, the Ninth Circuit "recognized" that *Boyer* and *Smallwood* misread *Cockrell*, Pet. 13, *Ritchey* does not mention *Boyer* (the only one of the two cases to have been decided before *Ritchey*), and, more fundamentally, it does not cite *Cockrell* in its two-sentence aside on whether a defense common to all parties can be the basis for fraudulent joinder.

3. Unable to cite any cases in which courts analyzed the question presented and disagreed with *Smallwood*'s holding, Petitioners focus on the "traditional test" for fraudulent joinder and try to make it appear that the decision below conflicts with cases that have applied that test. *See* Pet. 7, 9-10. *Smallwood* itself, however, properly stated that test. Pet. App. 5a. The Fifth Circuit then explained that the test is not sufficient in the narrow set of cases in which the defense upon which fraudulent

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[3](...continued)
LeBlang did not even consider whether fraudulent joinder could be based on defenses shared by diverse and non-diverse defendants. Rather, it upheld the dismissal of non-diverse defendants as fraudulently joined because the statute of limitations against them had run, without mentioning in the discussion of fraudulent joinder that at the time the case was filed the statute of limitations against the diverse defendant had run as well. The opinion offers no indication that the court gave any thought to the question presented here, and that question is not an aspect of the Seventh Circuit's holding.

joinder is based disposes of the claims against all defendants, because the defendant's arguments in those cases are not actually "going to the propriety of the joinder." *Id.* at 7a. That the court thought the test was inadequate under these factual circumstances does not establish a conflict with cases applying the test under other circumstances.

Because there is no circuit split among courts that have analyzed the question presented or that have analyzed *Cockrell* in the context of the question presented, the petition should be denied.

B. Petitioners Exaggerate The Importance Of The Question Presented.

Petitioners present a parade of horribles that they claim will result if this Court does not grant the petition. However, they vastly overstate the importance of the question presented and its impact on removal.

First, Petitioners note that hundreds of removal petitions based on diversity jurisdiction are filed each year and that in a significant portion of those cases the defendants claim that the in-state defendants have been fraudulently joined. Pet. 14. Petitioners may be right, but the decision below does not apply to most of those cases. Rather, it applies only in the narrow set of cases in which the claim of fraudulent joinder is based on a defense that disposes of the claims against the in-state and diverse defendants alike.

Second, Petitioners' claim that the decision below will create federal-state friction is unfounded. *See* Pet. 15. Contrary to Petitioners' assertions, the decision below does not indicate that federal courts are incompetent to make decisions on merits

issues. Rather, it concludes that federal courts cannot decide merits issues in the guise of determining whether there is diversity jurisdiction.

Finally, Petitioners exaggerate in asserting that *Smallwood* will cause plaintiffs to join MDOT in every railroad crossing case filed in Mississippi to defeat diversity jurisdiction. *See* Pet. 17. *Smallwood* would apply only if a defense that would keep the plaintiff from recovering against MDOT in state court were equally applicable to the diverse defendant. This circumstance will not be true of every railroad case.

C. The Decision Below Is Correct.

This Court has recognized that when a showing "indicate[s] that the plaintiff's case was ill founded as to all the defendants," such a showing goes "to the merits of the action as an entirety, and not to the joinder." *Cockrell*, 232 U.S. at 153 (1914). In other words, such a showing does not "engender or compel the conclusion that the [in-state defendants] were wrongfully brought into a controversy which did not concern them." *Id.*

Both the Third and Fifth Circuits have applied *Cockrell* to hold that defenses that are determinative of the claims against all of the defendants cannot be used as a basis for a finding of fraudulent joinder. Those courts recognized that when a court concludes that a case is untenable as to all defendants, it is not deciding an issue related to joinder; rather, it is determining the entire case. "In such cases, it makes little sense to single out the in-state defendants as 'sham' defendants and call their joinder improper. In such circumstances, the allegation of improper joinder is actually an attack on the merits of plaintiff's case as such[.]" Pet. App. 7a.

The courts of appeals' holdings on common defenses ensures that the theory of fraudulent joinder remains true to the purposes for which it was created. The fraudulent joinder doctrine is intended to guarantee that non-diverse defendants are not joined solely to defeat diversity jurisdiction. If a defense common to all defendants could form the basis for a finding of fraudulent joinder, then fraudulent joinder could be found in many cases in which the plaintiff did not sue the non-diverse defendant for the improper purpose of defeating diversity, but in which the plaintiff just had a weak case.

The decision below also protects the boundary between state and federal jurisdiction. Plaintiffs are entitled to have state courts decide the merits of cases alleging state-law claims against both diverse and non-diverse defendants. Diverse defendants often want to remove cases to federal court due to their perception that the federal forum will be more favorable to them. Under Petitioners' theory, such defendants can manipulate the system by removing the case, arguing their defenses as to the in-state defendants, and then arguing those exact same defenses as to the diverse defendants. Forbidding defenses common to all defendants from being used as the basis for a finding of fraudulent joinder ensures that fraudulent joinder is not used as a means to circumvent limits on federal jurisdiction.

CONCLUSION

The petition for a writ of certiorari should be denied.

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